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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

MARC WAKEFIELD DUNHAM

VS.

THE STATE OF TEXAS

**ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CAUSE NO. 14-17-00098-CR**

**Appealed from the County Criminal Court at Law Number 6
of Harris County, Texas
Cause No. 2109329**

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT GRANTED

IDENTITY OF THE PARTIES

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Appellee:	The State of Texas
Trial Prosecutor:	Valerie Turner 1201 Franklin Houston, Texas 77002
Appellate Prosecutor:	Katie Davis 1201 Franklin Houston, Texas 77002
Trial Judge:	Hon. Larry Standley 1201 Franklin Houston, Texas 77002

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STATEMENT OF THE CASE

Appellant pled not guilty to Class A misdemeanor deceptive business practice in cause number 2109329 in the County Criminal Court at Law Number 6 of Harris County before the Honorable Larry Standley. A jury convicted him, and the court assessed the maximum punishment of one year in jail and a $4,000 fine on January 27, 2017. L. Jeth Jones, II, represented him at trial.

The Fourteenth Court of Appeals affirmed the conviction in a published opinion issued on July 10, 2018. Appellant did not move for rehearing. This Court granted discretionary review on December 5, 2018. Dunham v. State, 554 S.W.3d 222, No. 14-17-00098-CR (Tex. App.—Houston [14th Dist.] 2018, pet. granted). Present counsel represented him.

ISSUES PRESENTED

1. The Fourteenth Court of Appeals erred in holding that the evidence is legally sufficient to sustain appellant's conviction for deceptive business practice where appellant did not make any affirmative misrepresentation, the State's theory of liability was based on an omission rather than an act, and the complainant accurately understood the commercial terms when the transaction occurred.

2. The Fourteenth Court of Appeals erred in holding that deceptive business practice is a "circumstance-of-conduct" offense instead of a "nature-of-conduct" offense and that the trial court properly instructed the jury in the charge that it need not agree unanimously that appellant committed the same specific act of deception to convict him (C.R. 87-88; 4 R.R. 103-08).

STATEMENT OF FACTS

A. The Allegation

The information alleged that appellant, while in the course of business, intentionally, knowingly, and recklessly committed Class A misdemeanor deceptive business practice three different ways (C.R. 8):

(1) he represented that a commodity or service was of a particular style, grade, or model if it was another by giving the impression to Eloise Moody, the complainant, that an alarm system was a Central Security Group (Central) alarm system when it was actually a Capital Connect (Capital) alarm system; "and/or"

(2) he represented the price of property or service falsely or in a way tending to mislead by telling Moody that a new alarm installation would be free when it required that she sign a new contract at an additional cost; "and/or"

(3) he made a materially false or misleading statement in connection with the purchase or sale of property or service by telling Moody that a new alarm system installation would be free when it required that she sign a new contract at an additional cost.

B. The Evidence

Moody, age 81, paid $22 per month for Central to monitor her residential burglar alarm system (3 R.R. 22-23, 25, 31). Appellant rang her doorbell on June 15, 2016, and said, "I'm here to update your security," and that he could put a light on her yard sign to make it more visible from the street (3 R.R. 24-25, 28). She assumed that he worked for Central, although he never said that he did, and she did not request his identification (3 R.R. 26, 28, 78-79, 104). He did not discuss

pricing at her front door (3 R.R. 29).

Moody allowed appellant inside her house to inspect her system (3 R.R. 26-27). He demonstrated features to activate and deactivate her alarm remotely, which her Central system lacked, and offered to upgrade her to a wireless system (3 R.R. 29, 34, 60, 93). The installation and new equipment were free, but she would have to pay for monitoring (3 R.R. 29, 31, 53, 60-61).

Appellant called Central for Moody to cancel her contract (3 R.R. 30, 35). Central said that she could not cancel, and she believed that she had to continue paying them (3 R.R. 36, 52). She first realized that appellant did not work for Central during that phone call.

Moody signed an alarm upgrade agreement and a Capital monitoring agreement with a $55.99 monthly fee (3 R.R. 36-44; 6 R.R. 3-18; SX 1, 2).[1] A technician arrived (3 R.R. 45). The upgrade agreement stated that Capital was not her current alarm company and that she had to cancel that service (6 R.R. 4; SX 1). The monitoring agreement stated that the equipment and installation were free and that she would pay for monthly monitoring (6 R.R. 11-12; SX 2).[2]

Appellant called a Capital representative to explain the procedures to Moody

[1] Moody told appellant that her daughter had to review the contract, but she signed it without calling her daughter (3 R.R. 63, 101).

[2] Moody testified that she did not know about the price increase when she signed the contract, she first learned about it when her daughter read the contract, and she would not have signed it had she known the monthly cost would be twice as much as her current system (3 R.R. 52-53, 62, 66).

(3 R.R. 53-54). In that recorded call, Moody understood that the representative worked with appellant's company, that she would pay $55 monthly for monitoring but no up-front costs, and that monitoring would cost more than her Central system (3 R.R. 79-84, 88; 6 R.R. 135-36; DX 2). The Capital system was installed at no cost, and she did not pay for the equipment (3 R.R. 68-69, 87-88). When appellant departed, the new Capital system worked as promised (3 R.R. 89-90).

Moody regretted her decision and told her daughter about it two days later (3 R.R. 56). Her daughter canceled the contract; Capital removed the system; and she obtained new service with another company, ADT (3 R.R. 57-58, 91, 97-98).

Five days after meeting appellant, Moody called the police to report "a possible scam" (3 R.R. 59, 157-59, 179). She gave them the signed agreements and appellant's business card, which identified him working for Capital; and she admitted signing the contract and giving Capital verbal authorization to install the system (3 R.R. 160, 187-88). The police learned that she canceled the contract and suffered no loss (3 R.R. 186-87). They did not test her new system to determine if it worked properly, did not determine if it was superior to her old system, and did not listen to the recorded call with the Capital representative before charging appellant (3 R.R. 182-85, 188).

C. The Arguments

The prosecutor argued that appellant misrepresented that a commodity or

service was of a particular style, grade, or model by giving Moody the impression that he worked for Central and would update her Central system, when he really worked for Capital (4 R.R. 115-17). He represented the price of property or service falsely or in a way tending to mislead, and he made a materially false or misleading statement in connection with the purchase or sale of property or service, by telling Moody that installation was free when it required that she sign a contract at a greater cost.

Defense counsel argued that Moody knew that appellant worked for Capital when she signed the contract and before installation (4 R.R. 121-22). She received what she contracted to receive, and appellant never discussed any model, style, or grade (4 R.R. 122-23). The equipment and installation were free, and the contract included the $55 monthly monitoring fee that he promised (4 R.R. 124-25, 128). The price did not differ from what he quoted (4 R.R. 125-27). Moody had no damages, canceled the Capital contract at no cost, and enjoys her new ADT system more than her old Central one (4 R.R. 125-26). Appellant never said that he worked for a different company, and Moody never asked him to leave (4 R.R. 129). Her mistaken assumptions about him did not constitute misrepresentations (4 R.R. 130). Most important, she knew that she was receiving a Capital system and knew the price when she signed the contract (4 R.R. 132). Being an effective salesman was not a crime (4 R.R. 129).

D. The Verdict And Sentence

The jury deliberated five hours and convicted appellant of deceptive business practice as alleged in the information (C.R. 89; 5 R.R. 6-7).

Appellant elected the court for punishment and filed a motion for probation (C.R. 49-50). The court noted that it is not permitted to transfer a misdemeanor probation to Arizona, where appellant lives (5 R.R. 48). It assessed the maximum punishment of one year in jail and a $4,000 fine (C.R. 91-92; 5 R.R. 53).

SUMMARY OF THE ARGUMENT

Appellant accurately told Moody that the equipment upgrade and installation were free but that she would have to pay monthly to monitor the system. This legitimate sales technique is how phone companies have sold cell phones and service. She signed documents and participated in a recorded phone call with Capital acknowledging that she understood the terms of the transaction.

After experiencing buyer's remorse, Moody canceled the Capital contract and called the police to report "a possible scam." The State charged appellant with deceptive business practice for giving her the "impression" that he was selling her a Central alarm system, when he really sold her a Capital system, and for telling her that the installation would be free when it required that she sign a new contract at an additional cost. In fact, she knew that she was receiving a Capital system and more expensive monitoring when the transaction occurred; and the equipment and

installation *were* free. The court of appeals' published affirmance of appellant's conviction criminalizes conduct that legitimate sales representatives engage in daily throughout Texas and the nation and would paralyze an entire industry.

The evidence is legally insufficient to sustain appellant's conviction for deceptive business practice. There was no evidence that he affirmatively represented that he was selling a Central alarm system. Moody admitted that he never stated that he worked for Central; she just assumed that he did. He never misrepresented for whom he worked, and all of his representations regarding a commodity or service were accurate. Furthermore, there was no evidence that he represented the price of property or service falsely or in a way tending to mislead, nor that he made a materially false or misleading statement in connection with the purchase or sale of property or service. The court of appeals erroneously held that the statute criminalizes conduct both leading up to and during the completion of a commercial transaction, even if the complainant ultimately signs a contract with full and accurate knowledge of the terms of sale. The court of appeals erroneously held that appellant committed a completed offense before entering Moody's house by pointing to her yard sign and stating, "I'm here to update your security." This Court should conclude that the evidence was legally insufficient because appellant did not make any affirmative misrepresentation, the State's theory of liability was based on an omission rather than an act, and Moody accurately understood the

commercial terms when the transaction occurred.

The court of appeals also erred in upholding the trial court's refusal to instruct the jurors in the charge that they must agree unanimously that appellant committed the same specific act of deceptive business practice, and in authorizing them to convict him even if they did not agree unanimously on which specific act he committed. The State alleged three separate criminal offenses of deceptive business practice in one paragraph of one count of one information. The trial court failed to instruct the jurors that they had to agree unanimously as to which specific act he committed. Instead, it instructed that they could convict even if they did not agree on which act he committed. The prosecutor emphasized the charge error during summation by arguing that the jurors did not have to agree on which act he committed, as long as they all believed that he committed at least one act. This preserved error resulted in "some harm" because the Court cannot determine if the jury reached a unanimous verdict as to a specific criminal act. The court of appeals erroneously held that deceptive business practice is a circumstance-of-conduct offense that does not require jury unanimity as to which prohibited act the defendant committed. This Court should hold that, under Texas law and the Due Process Clause, deceptive business practice is a nature-of-conduct offense that requires jury unanimity as to the prohibited act.

FIRST ISSUE

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION FOR DECEPTIVE BUSINESS PRACTICE WHERE APPELLANT DID NOT MAKE ANY AFFIRMATIVE MISREPRESENTATION, THE STATE'S THEORY OF LIABILITY WAS BASED ON AN OMISSION RATHER THAN AN ACT, AND THE COMPLAINANT ACCURATELY UNDERSTOOD THE COMMERICAL TERMS WHEN THE TRANSACTION OCCURRED.

A. Statement Of Facts

The pertinent facts are stated supra at 2-6.

B. The Court Of Appeals' Decision

Appellant contended on appeal that the evidence was legally insufficient to establish that he committed deceptive business practice in any of the three ways alleged. The State asserted that the statute criminalizes conduct both leading up to and during the completion of a commercial transaction, even if a complainant ultimately contracts for a commodity or service with full and accurate knowledge of the terms of sale.

The court of appeals held that "representing" includes appellant's conduct and statement when he initiated contact with Moody at her front door, pointed to her yard sign, and stated, "I'm here to update your security." Dunham, 554 S.W.3d at 229. "A rational inference from this statement and conduct is that appellant was describing a Central alarm system, although he was not," and even though he identified the Capital system accurately when he gave her the paperwork. Id.

C. Argument And Authorities

1. Standard Of Review

A challenge to the legal sufficiency of the evidence requires this Court to consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Byrd v. State, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). A court may hold that evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense, or (2) the evidence conclusively establishes a reasonable doubt that the defendant committed the offense. Jackson, 443 U.S. at 314, 320.

The State may prove the defendant's criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. Gardner v. State, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). Both the requisite culpable mental state and the prohibited act must be proven to convict the defendant. Bounds v. State, 355 S.W.3d 252, 255 (Tex. App.—Houston [1st Dist.] 2011, no pet.). A culpable mental state can be inferred from the acts, words, and conduct of the defendant. Patrick v. State, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995). A jury may consider events occurring before, during, and after the offense. In re I.L., 389 S.W.3d 445, 456 (Tex. App.—El Paso 2012, no pet.).

Because of the dearth of authority related to section 32.42 of the Penal Code, this Court should engage in statutory interpretation to determine whether the evidence was sufficient to establish that appellant committed the charged offense. In construing a statute, an appellate court must apply the plain meaning of its words unless the language of the statute is ambiguous or would lead to absurd results. Boykin v. State, 818 S.W.2d 782, 785-86 & 786 n.4 (Tex. Crim. App. 1991). Use of dictionary definitions of words contained in the statutory language is part of the "plain meaning" analysis that an appellate court initially conducts to determine whether the statute in question is ambiguous. Lane v. State, 933 S.W.2d 504, 515 n.12 (Tex. Crim. App. 1996). When the words of a statute are ambiguous, courts may look to extratextual factors to try to ascertain the statute's meaning. Boykin, 818 at 785-86. The provisions of the Penal Code "shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the code." TEX. PENAL CODE §1.05(a) (West 2016).

2. Appellant Did Not Make Any Affirmative Misrepresentation.

The information alleged that appellant first committed deceptive business practice by intentionally, knowingly, or recklessly representing that a commodity or service was of a particular style, grade, or model if it was another by giving the impression to Moody that an alarm system was a Central system when it was a

Capital system (C.R. 8).[3] TEX. PENAL CODE §32.42(b)(7). The evidence clearly established that appellant was "in the course of business," that he offered to install a "commodity," and that he offered to sell a "service."

The disputed issue was whether appellant, at a minimum, recklessly represented that the equipment or monitoring service were of a particular style, grade, or model when they were, in fact, of another. The Legislature did not define "representing," "style," "grade," or "model"; and no appellate court has done so.[4]

A "representation" is defined as "a presentation of fact—either by words or by conduct—made to induce someone to act, especially to enter a contract." Black's Law Dictionary, 540 (Pocket ed., 1996). In the context of a commodity or service, "style" is defined as "a distinctive or characteristic manner." The New Merriam-Webster Dictionary, 713 (1989 ed.). In this context, "grade" is defined as "a class of . . . things of the same rank or quality," id. at 325; and "model" is defined as "structural design." Id. at 471.

Using these ordinary dictionary definitions to determine the plain meaning

[3] Because the court of appeals held that the evidence was sufficient to establish that appellant misrepresented the particular style, grade, or model of a commodity or service, it did not decide whether the evidence was sufficient as to the other two acts alleged in the information. Dunham, 554 S.W.3d at 227, n.1.

[4] The First Court of Appeals addressed a challenge to the legal sufficiency of the evidence in a prosecution under subsection 32.42(b)(7) in Agbogun v. State, 756 S.W.2d 1, 2-3 (Tex. App.—Houston [1st Dist.] 1988, no pet.). It affirmed the conviction of a pharmacist who filled a prescription for a brand-name drug by substituting a generic drug but applying a label to the bottle for the brand-name drug. However, the court of appeals did not provide any guidelines for interpreting the statute that apply to appellant's case.

of the statute, the Legislature intended that a person commits the offense of deceptive business practice under subsection (b)(7) by:

(1) presenting as fact, either by words or conduct;

(2) that any tangible or intangible personal property or service;

(3) is of a particular

(a) distinctive or characteristic manner,

(b) class of things of the same rank or quality, or

(c) structural design;

(4) if the property or service is of another; and

(5) to induce someone to act, especially to enter a contract.

Applying that statutory interpretation to appellant's case, this Court first must determine whether appellant made any "representations" that the alarm system he offered to sell Moody was of any particular style, grade, or model. If the Court concludes that he made such a representation, it then must determine if the system, in fact, was a different style, grade, or model.

The State alleged that appellant made a "representation" by "giving the impression" to Moody that he was selling her a Central system. The State neither alleged nor proved any words or conduct by appellant to Moody "presenting as a fact" that he would install a Central system. To the contrary, Moody admitted that appellant never stated that he worked for Central; she just assumed that he did (3

R.R. 26, 28, 78-79, 104). She knew that she was canceling her service with Central to begin a new monitoring service with a different company (3 R.R. 30-36). As she attempted to cancel her Central service, she knew that appellant did not work for Central (3 R.R. 36). Appellant presented her with a Capital alarm monitoring agreement and an alarm upgrade agreement, which she signed and initialed (3 R.R. 37-45; 6 R.R. 3-18; SX 1, 2). The upgrade agreement stated that Capital was not related to or connected with her current alarm company and that she was responsible for canceling that service (6 R.R. 4; SX 1). She discussed the installation in a recorded phone call with a Capital representative, who explained the procedure and whom Moody understood worked with appellant's company (3 R.R. 53-54). Moody told the Capital representative that she understood that the monthly monitoring service would cost more than her old Central system (3 R.R. 88). Thus, appellant did not "represent" by words or conduct that he was selling Moody a Central system. To the contrary, he never misrepresented for whom he worked, and she knew that she was changing her service from Central to Capital when she executed the contract.

The court of appeals held that appellant committed a completed offense when he pointed to Moody's Central yard sign and said, "I'm here to update your security," because the jury rationally could have concluded that he was "describing a Central alarm system, although he was not." Dunham, 554 S.W.3d at 229. In

support of this conclusion, the court of appeals cited Agbogun, 756 S.W.2d at 2-3. However, that case is distinguishable from appellant's because Agbogun, a pharmacist, put a name-brand label on a bottle containing a generic prescription drug. Thus, by causing the name-brand label to be affixed to the prescription bottle, Agbogun clearly represented that he was providing a particular "style," "grade," or "model" of commodity to the customer, when in fact he was providing a different, generic prescription drug. Conversely, appellant did not tell or otherwise represent to Moody that he was providing her with an updated Central system, only to cause an inferior Capital system to be installed. Accordingly, Agbogun does not support the court of appeals' decision.[5]

Every affirmative representation that appellant made regarding a commodity or service was accurate. He told Moody that the new equipment and installation were free, which was true (3 R.R. 29, 60-61, 68-69, 87-89). He told her that the new system was wireless, which was true (3 R.R. 34, 60-61). He told her that she had to cancel her contract with Central, which was true (3 R.R. 35). He presented her with a Capital contract that stated that the equipment and installation were free, that she would pay $55.99 per month for monitoring, and that she was responsible for canceling her current service, all of which were true (3 R.R. 36-45, 85; 6 R.R. 3-18; SX 1, 2). The new system worked when he departed, just as he said it would

[5] Appellant's research reflects that his is the first case to apply Agbogun regarding the sufficiency of evidence to sustain a conviction for deceptive business practice.

(3 R.R. 89-90). Accordingly, the evidence was legally insufficient to establish that appellant made any affirmative misrepresentation to Moody that the equipment or monitoring service was of a particular style, grade, or model.

The court of appeals did not address whether the evidence was sufficient as to the other two acts alleged in the information—that appellant represented the price of property or service falsely or in a way tending to mislead, and that he made a materially false or misleading statement in connection with the purchase or sale of property or service. In fact, he accurately represented that the equipment and installation would be free, as well as the amount of the monthly monitoring fee. He made no misrepresentation, materially false statement, or misleading statement regarding the price, purchase, or sale of any property or service. Accordingly, the evidence was legally insufficient to establish that he committed the offense under the alternative theories of criminal liability.

3. The State's Theory Of Liability Was Based Improperly On A Reckless Omission Rather Than An Act, And Appellant Did Not Act Recklessly In Any Event.

The court of appeals did not address, nor did the evidence demonstrate, how a Central system was a different style, grade, or model from a Capital system. Instead, it concluded that the evidence was sufficient based only on appellant's *failure* to identify the commodity and service as a Capital system when he *first* spoke to Moody at the front door, even though he accurately made that

representation after he entered the house and before the transaction. Dunham 554 S.W.3d at 229. It also held that appellant's *failure* to act at the front door demonstrated recklessness because he foresaw the risk that he was representing the Capital system as a Central one and consciously disregarded the risk. Id. at 230. Specifically, it held that he acted recklessly by failing to "volunteer" that he worked for Capital before he entered Moody's house and by not wearing a uniform, nametag, or anything else to identify that he worked for Capital. Id. Thus, it affirmed the conviction based on omissions rather than an act. This conclusion erroneously conflicts with applicable authorities and public policy.

Texas law prohibits *acts* of deceptive business practice, not *omissions*. "A person who omits to perform an act does not commit an offense unless a law . . . provides that the omission is an offense or otherwise provides that he has a duty to perform the act." TEX. PENAL CODE §6.01(c); Sabine Consol., Inc. v. State, 816 S.W.2d 784, 787 (Tex. App.—Austin 1991, pet. ref'd). The deceptive business practice statute does not provide that an omission is an offense, nor does it provide that a person doing business has a duty to perform any particular act. For example, no statute required appellant to introduce himself as an independent contractor working for Capital when Moody answered her door, nor was he operating under a statutory duty to wear a uniform, nametag, or anything else identifying him as an employee of Capital. Had he affirmatively misrepresented that he worked for

Central, that conduct may have constituted a prohibited act. Had he promised to install a superior alarm system but really installed an inferior one, that act would have violated the statute. However, that he omitted whom he worked for until after he entered her house did not constitute an offense, especially where he accurately identified himself as a Capital representative before the commercial transaction.

The court of appeals ignored appellant's section 6.01(c) argument, even though he made it during oral argument. The court of appeals' decision cannot be squared with any interpretation of sections 6.01(c) and 32.42(b), much less a commonsense one. This Court should hold, as a matter of first impression, that the deceptive business practice statute does not criminalize omissions where the statute does not impose any duties to act on persons engaged in the practice of business. Anyone who finds that decision distasteful may lobby the Legislature to amend the statute to impose such duties.

Assuming *arguendo* that appellant committed a prohibited act—which he does not concede—there is no evidence, or merely a modicum of evidence, that he acted with a culpable mental state. At the very least, the State was required to present evidence of circumstances from which a rational jury could infer that he acted recklessly—that is, that he was aware of but consciously disregarded a substantial and unjustifiable risk that circumstances surrounding his conduct exist. See TEX. PENAL CODE §6.03(c). To determine whether conduct is reckless, courts

must look to: (1) whether the act, when viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred; (2) whether that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation; (3) whether the defendant was consciously aware of that risk; and (4) whether the defendant consciously disregarded that risk. Bounds, 355 S.W.3d at 256. "In other words, the State was required to prove that appellant 'actually fore[saw] the risk and consciously decided to ignore it.'" Id. (quoting Williams v. State, 235 S.W.3d 742, 751-52 (Tex. Crim. App. 2007) (explaining that "devil may care" or "not give a damn" attitude raises conduct from criminal negligence to recklessness)).

Even viewed in the light most favorable to the verdict, the evidence is insufficient to establish that appellant acted with a culpable mental state when he pointed at Moody's yard sign and said that he was there to update her security. In fact he *was* there to update her security. Had he told her that he was going to update her system knowing that he would make no material improvements to it, or that he would install an inferior one, his statement would have been criminal. However, there is not even a modicum of evidence that he recklessly engaged in criminal conduct. Assuming *arguendo* that he foresaw a risk that he was representing the Capital system as a Central one, it was neither substantial nor

unjustifiable. See Bounds, 355 S.W.3d at 255-56 (evidence legally insufficient that defendant had culpable mental state to commit deceptive business practice).

Bounds involved a contract dispute over home repairs between a homeowner and a general contractor. The parties entered into a written contract for $36,000. When the homeowner stopped paying on the contract before the work was completed, the contractor pulled his crew off the job and stopped performing the repairs. Id. at 253-54. The contractor was convicted of selling less than the represented quantity of property or service. Id. at 254. The court of appeals reversed because there was no evidence that he acted with a culpable mental state when he entered into the agreement to provide services to the homeowner, and a rational juror could not infer that he did not intend to perform the services at that time. Id. at 256. Additionally, there was no evidence that he recklessly sold less than he represented when he pulled his crew off the job after the homeowner stopped paying. Id. at 256-57.

As in Bounds, there was no evidence, or merely a modicum of evidence, that appellant was aware of but consciously disregarded *a substantial and unjustifiable risk* that Moody would receive the "impression" that he worked for Central because he pointed at her yard sign and said that he was there to update her service. The evidence was legally insufficient to establish that he acted recklessly, or with any culpable mental state, even if he committed a prohibited act.

Additionally, the court of appeals' decision undermines public policy. Texas proclaims itself a welcoming environment for business with limited regulations. Business by nature is competitive—especially commission sales—and sales representatives may promote commodities and services aggressively without violating the law. It would establish bad public policy to criminalize effective sales tactics. If the Legislature is offended by appellant's tactics, it may amend the statute to criminalize omissions by providing affirmative duties to act. Should appellant's conviction stand, no salesperson is safe from prosecution.

4. The Complainant Accurately Understood The Commercial Terms When The Transaction Occurred.

Appellant contended on appeal that any misunderstanding that Moody initially had about whether appellant worked for Central could not form the basis of a conviction for deceptive business practice where she had a full and accurate understanding of the terms of sale at the time of the commercial transaction. Most importantly, she knew that appellant worked for Capital and was offering to install a Capital system, that Capital would monitor the system if she agreed to the contract, and that she would have to cancel her existing service with Central. The court of appeals held to the contrary: "The relevant inquiry does not focus on what the complainant knew at the time she signed the contract; instead, it focuses on what appellant did—what he represented—during the course of business." Dunham, 554 S.W.3d at 229. The court of appeals misses the forest through the

trees. The offense must focus on what the complainant knew at the time of the contract because the law requires that she be deceived. Where Moody knew that appellant worked for Capital, that the new contract was with Capital, and that she would have to cancel her service with Central—and she executed the contract anyway—clearly she was not deceived. That she experienced buyer's remorse two days later, after her daughter told her that she could not afford a more expensive monitoring service, does not mean that she was the victim of a crime when she executed the contract.

In fairness, the devil is in the details. Assume hypothetically that appellant did not identify which company he worked for, did not have Moody initial the upgrade agreement stating that Capital was not her current alarm company and that she had to cancel the Central service, and did not have her participate in the recorded phone call with the Capital representative. Setting aside the question of whether a defendant can be convicted based on omissions, in that scenario, if she executed the contract without ever being told that she was changing companies, the State would have a much stronger case of deception. But here, there were multiple intervening acts that attenuated the initial omission on which the court of appeals based its decision. That court erroneously focused only on what happened at Moody's front door and ignored everything that occurred after appellant entered her house. An appellate court reviewing the sufficiency of the evidence must

consider all the evidence and not cherry-pick only what supports the conviction. Accordingly, the court of appeals erred in concluding that the evidence was sufficient where Moody accurately understood the commercial terms when the transaction occurred. Bounds, 355 S.W.3d at 256 (evidence legally insufficient that defendant had culpable mental state to commit deceptive business practice when he entered into contract with complainant). This Court should reverse the conviction and issue an appellate acquittal.

SECOND ISSUE

DECEPTIVE BUSINESS PRACTICE IS A "NATURE-OF-CONDUCT" OFFENSE INSTEAD OF A "CIRCUMSTANCE-OF-CONDUCT" OFFENSE, AND THE JURY MUST AGREE UNANIMOUSLY THAT THE DEFENDANT COMMITTED THE SAME SPECIFIC ACT OF DECEPTION TO CONVICT HIM (C.R. 87-88; 4 R.R. 103-08).

A. Statement Of Facts

The prosecutor stated during *voir dire* that she could prove the crime three different ways, that the jury only had to believe one, and that she did not have to prove all three (2 R.R. 58-60).

The application paragraph of the charge instructed the jury that it could convict appellant if it found beyond a reasonable doubt that he committed deceptive business practice either (1) by representing that a commodity or service was of a particular style, grade, or model when it was another; or (2) by representing the price of property or a service falsely or in a way tending to

mislead; or (3) by making a materially false or misleading statement in connection with the purchase or sale of property or a service (C.R. 87).

Importantly, the court then instructed the jury, "In order to find the defendant guilty you must each believe beyond a reasonable doubt that the Defendant committed at least one of the three allegations as stated above, but you need not be unanimous as to which of the three allegations was proven" (C.R. 88) (emphasis added). Appellant objected to the "unanimity problem" on due process grounds, and the court refused his request for separate verdict forms for each alleged act instead of a general verdict (4 R.R. 103-08).

The prosecutor argued that appellant committed the offense three different ways but that the jurors did not have to agree on which one, as long as they all believed that he committed it at least one way (4 R.R. 115-17):

> "[N]ot all six of you have to agree as to which way that the State has proven this. Some of you may believe, well, I definitely think it's number one; and others of you may think, no, I think it's two or three. The bottom line is it doesn't matter, as long as every one of you six jurors believes that the defendant committed this offense one of these three ways."

The jury deliberated five hours (C.R. 89; 5 R.R. 6-7).

B. The Court Of Appeals' Decision

Appellant contended in the court of appeals that deceptive business practice is a nature-of-conduct offense that requires unanimity about which specific act the

defendant committed. As a matter of first impression, the court of appeals held that it is a circumstance-of-conduct offense because the gravamen of the crime is the circumstance of being in the course of business. Dunham, 554 S.W.3d at 233-34. Thus, the jury need only be unanimous that appellant acted in the course of business, not that he committed the same specific act.

The court of appeals followed this Court's recent decision regarding the organized criminal activity statute. O'Brien v. State, 544 S.W.3d 376 (Tex. Crim. App. 2018). Appellant's case is the first to apply O'Brien.

The court of appeals refused to consider appellant's due process theory of error. Dunham, 544 S.W.3d at 234, n.6 ("Appellant does not contend in this appeal that unanimity is required by the Due Process Clause of the United States Constitution."). However, due process was incorporated repeatedly in his trial court objection (4 R.R. 105-08) ("these are very distinct elements that look at very distinctly different concepts that the jury is deciding. So I'm looking at due process problems . . . ."; citing Richardson on "due process question"; general verdict "would create a due process problem").

C. Argument And Authorities

1. Standard Of Review

When reviewing a jury charge issue, this Court first must determine whether error exists. Middleton v. State, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). If

it finds error, it then analyzes that error for harm. Id.

Jury charge error requires reversal when the defendant properly objected to the charge and there was "some harm" to his rights. Almanza v. State, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); Hutch v. State, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). Where jury charge error is preserved for appeal, a new trial is required if the defendant suffered "*any* harm, regardless of degree." Arline v. State, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986) (emphasis in original). "Cases involving preserved charging error will be affirmed only if *no* harm has occurred." Id. To determine whether the defendant was harmed, this Court must consider the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. Id. at 351-52.

2. The Charge Error

A jury charge that authorizes a non-unanimous verdict concerning what specific criminal act the defendant committed constitutes error. Francis v. State, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000); Ngo v. State, 175 S.W.3d 738, 749 (Tex. Crim. App. 2005). Texas courts have "been progressively moving in the direction of interpreting statutory language in terms of 'more offenses' and less in terms of 'manner and means,'" especially where the offense focuses on the nature of conduct. Gandy v. State, 222 S.W.3d 525, 530 (Tex. App.—Houston [14th

Dist.] 2007, pet. ref'd) (illegal dumping); see Vick v. State, 991 S.W.2d 830, 833-34 (Tex. Crim. App. 1999) (aggravated sexual assault); Pizzo v. State, 235 S.W.3d 711, 716-19 (Tex. Crim. App. 2007) (indecency); Ngo, 175 S.W.3d at 744 (credit card abuse); Stuhler v. State, 218 S.W.3d 706, 718-19 (Tex. Crim. App. 2007) (injury to child). If the "gravamen" of the offense is the defendant's conduct, different types of conduct are considered separate offenses. Huffman v. State, 267 S.W.3d 902, 907 (Tex. Crim. App. 2008).

The Legislature set forth 12 different ways a person can commit the offense of deceptive business practice. TEX. PENAL CODE §32.42(b). Each focuses on the defendant's conduct, not on a particular result or circumstance of such conduct.[6] Compelling evidence that the Legislature intended each act to be a separate offense is that it designated six as Class C misdemeanors if committed negligently but as Class A misdemeanors if committed intentionally, knowingly, or recklessly. However, it designated the other six as Class A misdemeanors regardless of the culpable mental state. Id. at §§(c) & (d). Under this statutory framework, the Legislature clearly intended that these 12 enumerated acts of deceptive business practice constitute separate offenses, not different manner and means of committing one offense.

[6] The proscribed conduct in each of the enumerated statutory violations of the law includes (1) using, selling, or possessing; (2) selling; (3) taking; (4) selling; (5) passing off; (6) and (7) representing; (8) advertising; (9) representing; (10) making a statement; (11) conducting a contest; and (12) making a statement.

The information charging appellant with deceptive business practice under section 32.42 of the Penal Code alleged three statutorily different criminal acts:

(1) representing that a commodity or service was of a particular style, grade, or model if it was another; TEX. PENAL CODE §32.42(b)(7);

(2) representing the price of property or service falsely or in a way tending to mislead; TEX. PENAL CODE §32.42(b)(9); and

(3) making a materially false or misleading statement in connection with the purchase or sale of property or service; TEX. PENAL CODE §32.42(b)(12)(B).

The State charged all three offenses in one paragraph in one count of one information (C.R. 8). See TEX. CRIM. PROC. CODE art. 21.24(b) (West 2016) ("A count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense."); see also Francis, 36 S.W.3d at 126 (Womack, J., concurring) ("Our law allows only one offense to be charged in each paragraph of an indictment, information, or complaint. Here, the State, having chosen to plead only one paragraph, was required to elect one incident on which to rely. This requirement is not only essential to giving a defendant the requisite notice of the charge against which to defend, it helps assure that the jury's verdict will be unanimous."). The State sought one conviction for the commission of one deceptive trade practice offense by proving any of three

different criminal acts alleged three different ways within one paragraph.

"When the State charges different criminal acts, regardless of whether those acts constitute violations of the same or different statutory provisions, the jury must be instructed that it cannot return a guilty verdict unless it unanimously agrees upon the commission of any one of these criminal acts." Ngo, 175 S.W.3d at 744. "The unanimity requirement is undercut when a jury risks convicting the defendant of different acts, instead of agreeing on the same act for a conviction." Francis, 36 S.W.3d at 125.

In appellant's case, the trial court instructed the jury in the application section of the charge on three offenses disjunctively in three separate paragraphs (C.R. 87). Importantly, it also instructed the jury that it "need not be unanimous as to which of the three allegations was proven" (C.R. 88). Not only did the trial court fail to instruct the jury that it needed to be unanimous as to which criminal act appellant committed, but it affirmatively and erroneously instructed the jury that it *need not* be unanimous as to which of the three allegations was proven.

The Texas Constitution and Code of Criminal Procedure require jury unanimity in all criminal cases in Texas. O'Brien, 544 S.W.3d at 382. The unanimity requirement is a complement to and helps effectuate the beyond-a-reasonable-doubt standard of proof. United States v. Gipson, 553 F.2d 453, 457 n.7 (5th Cir. 1977). "Unanimity in this context means that each and every juror

agrees that the defendant committed the same, single, specific criminal act." Ngo, 175 S.W.3d at 745. A unanimous verdict is more than a mere agreement on a violation of a statute; it ensures that the jury agrees on the factual elements underlying an offense. Francis, 36 S.W.3d at 125. A charge that allows for a non-unanimous verdict contains error. Cosio v. State, 353 S.W.3d 766, 774 (Tex. Crim. App. 2012).

This Court first must examine the statutory language to determine whether the Legislature created a single offense with multiple or alternate modes of commission. O'Brien, 544 S.W.3d at 382-83. It must determine the focus or gravamen of the offense. Id. at 383. If the gravamen is the nature of the conduct, the jury must be unanimous about the specific criminal act. Id. If the gravamen is the circumstances of the offense, the jury must be unanimous about the existence of the particular circumstance. Id. This inquiry is primarily a question of legislative intent. Id. at 384.

Next, the Court asks whether jury unanimity on the alternate means or modes of commission—the brute facts of the offense—is required as a matter of due process because the alternate means are so disparate as to become two separate offenses. Id. at 383. The Constitution limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or

tradition. Id. (citing Richardson v. United States, 526 U.S. 813, 820 (1999)). This Court resolves the due process question by determining whether the acts or omissions that combine to establish an offense are "basically morally and conceptually equivalent." Id. at 384. The court of appeals erred in refusing to engage in this analysis even though this Court's doctrine requires it as the essential second prong to a jury unanimity analysis, and even though appellant made a due process objection in the trial court.

Representing that a commodity or service was of a particular style, grade, or model if it was another is not the same specific criminal offense as representing the price of property or service falsely or in a way tending to mislead. Nor is either one of those acts the same specific criminal offense as making a materially false or misleading statement in connection with the purchase or sale of property or service. All three of these acts are deceptive business practice offenses, but they are not the same, specific deceptive business practice acts committed at the same time or with the same *mens rea* and the same *actus reus*. Moreover, they are so disparate as to become separate offenses because they are not morally and conceptually equivalent. This first act—representing that a commodity or service was of a particular style, grade, or model if it was another—involves a deception of what the defendant is selling. The second and third acts—representing the price of property or service falsely or in a way tending to mislead, and making a materially

false or misleading statement in connection with the purchase or sale of property or service—relate to deception of the terms of sale, usually the price. Although all three involve a type of deception, they are not conceptually equivalent acts. Thus, due process requires that they be treated as separate offenses.

Whether the deceptive business practice statute requires jury unanimity is an issue of first impression that O'Brien does not control. The *raison d'etre* of the organized crime statute is to punish more harshly the predicate offenses when they are committed by a combination that collaborates in carrying on criminal activities. Without the circumstance of that combination, the State would prosecute the predicate offenses individually. Because of that combination, the State may prosecute a more serious offense. Thus, the circumstance of the combination is the gravamen of the offense. The same is true of the felony murder statute and the aggravated theft statute—each of which requires proof of a predicate offense that is separately prosecutable as a discreet offense. By contrast, the enumerated acts in the deceptive business practice statute are not predicate offenses that can be prosecuted separately from that statute. The enumerated acts in the statute constitute a criminal offense only because they are prohibited by the deceptive business practice statute. Unlike the organized crime, felony murder, and aggravated theft statutes, the conduct that constitutes a deceptive business practice is the *raison d'etre* of the statute. Accordingly, the gravamen of the offense is the

nature of the conduct itself, not the circumstances surrounding the conduct. Although the circumstance of being in the course of business is an essential element of the offense, which the jury must find beyond a reasonable doubt, it is not the gravamen of the offense. Being in the course of business is not inherently criminal. Doing business is a good thing. The additional, enumerated criminal acts of deception are what criminalizes otherwise innocent business conduct. By contrast, in the organized crime statute, the act of establishing, maintaining, or participating in a criminal combination is itself inherently criminal and is the focus of that statutory scheme. The criminal combination is what differentiates and aggravates the conduct of the underlying predicate offenses.

Appellant could have forced the State to elect which specific act it was relying on for conviction, but such a request was not necessary to require jury unanimity. Ngo, 175 S.W.3d at 748. "Nonetheless, the jury must reach a unanimous verdict on which single, specific criminal act the defendant committed." Id. The failure to request an election means that the jury may be instructed on different criminal acts in the disjunctive, but it still must be instructed that it must unanimously agree on one specific criminal act. Id. Although appellant did not ask the State to elect a specific act, he requested separate verdict forms for each alleged act instead of one general verdict (4 R.R. 103-08).

A jury charge that authorizes a non-unanimous verdict concerning what

specific criminal act the defendant committed constitutes error. Francis, 36 S.W.3d at 125; Ngo, 175 S.W.3d at 749. The jury charge in appellant's case was even more erroneous than the charges in Francis and Ngo because, in those cases, the failure to instruct the jury on the unanimity requirement created the *risk* that the jury "could well have been misled into believing that only its ultimate verdict of 'guilty' need be unanimous," Ngo, 175 S.W.3d at 749, whereas in appellant's case the jury was affirmatively and erroneously misled into believing that it "need not be unanimous as to which of the three allegations was proven" (C.R. 88).

3. Appellant Suffered "Some Harm."

Appellant preserved the charge error by objecting to the "unanimity problem" and requesting separate verdict forms for each alleged act instead of a general verdict (4 R.R. 103-08). Thus, this Court must review the charge error for "*any* harm, regardless of degree." Arline, 721 S.W.2d at 351.

The record demonstrates that appellant suffered more than just "any" or "some" harm. The trial court not only failed to properly instruct the jury on the unanimity requirement but also affirmatively and erroneously instructed the jury that it *need not* be unanimous as to which specific criminal act appellant committed. Moreover, the prosecutor compounded the charge error by arguing at summation that the jurors did not have to agree on which way appellant committed the offense, as long as they all believed that he committed it at least one of the

three ways alleged (4 R.R. 115-17):

> "[N]ot all six of you have to agree as to which way that the State has proven this. Some of you may believe, well, I definitely think it's number one; and others of you may think, no, I think it's two or three. The bottom line is it doesn't matter, as long as every one of you six jurors believes that the defendant committed this offense one of these three ways."

Both the trial court and the prosecutor affirmatively told the jury that it need not return a unanimous verdict.

In addition to the prosecutor's emphasis of the charge error, this was a closely contested case, as evidenced by five hours of jury deliberations (5 R.R. 6-7). Some jurors could have found appellant's defense to one or more of the three allegations persuasive while finding another one unpersuasive. For example, even if five jurors believed that appellant only misrepresented the particular style, grade, or model of a commodity or service but one juror believed instead that he only misrepresented the price of property or service falsely or in a way tending to mislead, then the verdict was not unanimous.

The absence of a unanimity instruction in the charge was not corrected elsewhere in the charge. Instead, the trial court's affirmatively erroneous instruction and the prosecutor's affirmatively erroneous argument that the jury could return a non-unanimous verdict compounded the harmful effect of the charge error. Given the state of the evidence, this Court cannot determine that the jury

was unanimous in finding appellant guilty of one specific offense of deceptive business practice. This Court concluded that similar, unpreserved charge error caused egregious harm in Ngo. See also Hines v. State, 269 S.W.3d 209, 220-22 (Tex. App.—Texarkana 2008, pet. ref'd) (unpreserved jury charge error regarding unanimity caused egregious harm where prosecution emphasized error during summation). Here, preserved error caused just as much, if not more, harm than in Ngo. Accordingly, appellant's right to a unanimous jury verdict was violated, and this violation caused "some harm" to his rights. This Court must set aside the judgment and remand for a new trial.

CONCLUSION

The Court should reverse the Court of Appeals' decision and issue an appellate acquittal or, alternatively, set aside the judgment of conviction and remand for a new trial.

Respectfully submitted,

/S/ Josh Schaffer

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CERTIFICATE OF SERVICE

I served a copy of this document on Katie Davis, assistant district attorney for Harris County; and on Stacey M. Soule, State Prosecuting Attorney, by electronic service and electronic mail on January 24, 2019.

/S/ *Josh Schaffer*
Josh Schaffer

CERTIFICATE OF COMPLIANCE

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/S/ *Josh Schaffer*
Josh Schaffer